IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRIMINAL MISC.NO.21713 M OF 2007

DATE OF DECISION: JULY 30,2007

Amarinder Singh and another

.....Petitioners

VERSUS

State of Punjab and others.

....Respondents

CORAM:- HON'BLE MR.JUSTICE RANJIT SINGH

1. **Whether Reporters of local papers may be allowed to see the judgement?**
2. **To be referred to the Reporters or not?**
3. **Whether the judgment should be reported in the Digest?**

PRESENT: Mr. R.S.Ghai, Sr.Advocate with
Mr. M. L.Saggar, Sr.Advocate with
Mr. G.S.Brar, Mr.J.S.Dhaliwal &
Mr. G.P.Vashisht, Advocates,
for the petitioners.

Mr. H. S. Mattewal, Advocate General, Pb. With
Mr. M. C. Berry, Sr.DAG, Punjab,
for the State.

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RANJIT SINGH, J.

While issuing notice to the State in this case, the allegations made against the petitioners in the FIR were noticed in detail and bail granted to the petitioners in anticipation of their arrest subject to the satisfaction of Arresting Officer. This bail was subject to the conditions contained in Section 438 (2) Cr.P.C. The petitioners were further directed to join investigation as and when summoned. This order was impugned by the State by filing Special Leave Petition before the Hon'ble Supreme Court. On 20.6.2007, while dismissing the

S.L.P., Hon'ble Supreme Court held as under:-

> "Heard learned counsel for the petitioner and Mr.K.Parassarn learned senior counsel. It is stated that the matter has been fixed for 30.7.2007. It is stated that the respondents are willing to appear on the 4th July, 2007 so that their application can be disposed of in accordance with law. In view of this statement, we are not inclined to interfere with the impugned order which is an interim order. We make it clear that while dealing with the application for bail the principles laid down by this Court in ***Adri Dharan Das Vs. State of West Bengal,*** reported in 2005 (4) SCC 303 shall be kept in view.
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> Since the other matters are listed on 4th July, 2007, we are not inclined to interfere with the impugned orders which are interim in nature. While dealing with these petitions the Court shall keep in view the law laid down in 2005 (4) SCC 303. The special leave petitions are dismissed accordingly."

The copy of the above order has been placed on record by the State alongwith numerous Zimni orders and affidavit of the Investigating Officer, revealing the material collected in the course of investigation in this case. Keeping in view the order passed by the Hon'ble Supreme Court, the case was taken up for hearing on 4.7.2007 by preponing the same and was heard on subsequent dates. The petitioners have filed their response to the details brought on record by the Investigating Agency and, thus, a routine application

for anticipatory bail has been made to acquire voluminous record running in hundreds of pages. Not only this, numerous issues, almost settled, have been racked up in a hot debate spanning over days of arguments. To understand the nature of challenge raised in the S.L.P., the State was told to place on record the copy thereof. From the perusal of the S.L.P., it is noticed that the State had made a mention to number of facts and placed material on record, which was either not available or came into being subsequent to the date of the order. In order to have a clear picture in this regard, the Investigating Officer was required to file an affidavit indicating what all material, which was referred to in the S.L.P., was not available on record of the present petition at the time of passing of the interim order. Though the order was complied with but the Investigating Officer appears to have made conscious effort to be evasive in this regard and instead has made painstaking efforts in stating what he had already placed on record in the form of Zimni orders earlier. The Investigating Officer seems to convey that the statement made by one Chetan Gupta is the only material, which was not available when this Court made the interim order and this has been referred to in the S.L.P. This may not reflect the true picture in this regard. There are numerous additional material which were unfairly placed on record of the S.L.P. without these being made available before this Court. As an example, it may be noticed that the State has placed Annexure P-13 on record of the S.L.P., which is stated to be an application moved before this Court for recall of the interim order passed by this Court in the present petition. This application had never been listed before this Court but is so mentioned in the S.L.P. So would be the

position in regard to Annexures P-1, P-2, P-5, P-6, P-7, P-8, P-9, P-10 etc. This requirement was projected to the Investigating Officer in the light of the certificate given by counsel for the State of Punjab that this Special Leave Petition is confined only to the pleadings before the Punjab and Haryana High Court at Chandigarh. This certificate by the counsel was on instructions given by the Investigating Officer. Thus, a clear attempt on the part of the Investigating Officer and the State to mis-lead can be seen. Investigating Officer is an officer having rank of S.P. He is not a fresher who can be asked to sign on dotted lines. He has been found utterly casual in another case connected with this FIR where he has acted in this manner. I say no more on this, except that the State and the Investigating Officer can be expected to behave more responsibly rather than acting in this casual and chivalrous manner.

A simple requirement for deciding the prayer for pre-arrest bail made by the petitioner is made to acquire contentious issues. Applications for grant of anticipatory bail are filed before this Court in a plenty in routine and are dealt with so in large number. Still this case has been a subject matter of intensive debate and heated arguments. It is perhaps because of the personalities involved, and if one was to quote the petitioners, is purely due to a political vendetta against the petitioners upon change of Government in the State. Extensive arguments spanning over days and numerous judgments cited by the counsel in support of their respective submissions have given real task to the Court. Thus, a small issue requiring to see if interim anticipatory bail granted to the petitioner is to be continued or not, has invited debate on the nature

of order to be made and even to the very grant of power of anticipatory bail, as it is loosely referred. As the counsel appearing for the respective parties have made submissions in detail before me, it would be rather unfair not to deal or discuss with the issues that have been agitated before me and accordingly I proceed to do so.

The primary issue that would arise for consideration flows from the observations made by the Hon'ble Supreme Court as reproduced above. The ratio of law laid down by the Hon'ble Supreme Court in the case of ***Adri Dharan Das Vs. State of W.B.,*** (2005) 4 Supreme Court Cases 303 was a matter of intense debate where the counsel took varying stand which was to an extent unreasonable from both sides.

Mr.R.S.Ghai, appearing for the petitioners, made extensive reference to the case of ***Gurbaksh Singh Sibbia etc. Vs. The State of Punjab,*** AIR 1980 Supreme Court 1632 to say that the judgment has settled the law regarding grant of anticipatory bail and other connected issues without any scope of doubt and that it is required to be followed, being a decision by a Constitutional Bench, even if some different observations are made in any judgment, which is by a Bench of lesser Judges. In a way, Mr.Ghai sought to contend that if law laid down in Adri Dharan Das's case (supra) was contrary to the view taken by the Constitutional Bench in Gurbaksh Singh Sibbia's case (supra), then the Court would be bound to follow the law laid down by the Constitutional Bench rather than in any other judgment rendered by Bench constituted by less number of Judges. Learned Advocate General, however, joins serious issues in this

regard and submits that this Court would be bound to follow the ratio of law laid down in Adri Dharan Das's case (supra), as has been specifically directed to do so in the present case rather than looking for law laid down anywhere else. To support their respective submissions, the counsel have referred to some judgments, which may need a notice here. Mr.Ghai has drawn my attention to the case of ***P.Ramachandra Rao Vs. State of Karnataka,*** AIR 2002 SC 1856, particularly to the observations made by Doraiswamy Raju, J., which read as under:-

> "2. The declaration of law made by the Constitution Bench of five learned Judges of this Court in the decision reported in A.R.Antulay's case [(1992) 1 SCC 225] still holds the field and its binding force and authority has not been undermined or whittled down or altered in any manner by another decision of a larger Bench. Consequently, the Benches of lesser number of Constitution of Judges which dealt with the case reported in "Common Cause" A Regd. Society through its Director v. Union of India & Ors. [(1996) 4 SCC 33]; "Common Cause" A Regd.Society through its Director v. Union of India & Ors. [(1996) 6 SCC 775]; Raj Deo Sharma v. State of Bihar [(1996) 7 SCC 507] and Raj Deo Sharma (II) v. State of Bihar [(1997) 7 SCC 604] could not have laid down any principles in derogation of the ratio laid down in A.R.Antulay's case (supra) either by way of elaboration, expansion, clarification or in the process of trying to distinguish the same with reference to either the

nature of causes considered therein or the consequences which are likely to follow and which, in their view, deserve to be averted. Even where necessities or justification, if any, were found therefor, there could not have been scope for such liberties being taken to transgress the doctrine of binding precedents, which has come to stay firmly in our method of Administration of Justice and what is permissible even under such circumstances being only to have had the matter referred to for reconsideration by a larger Bench of this Court and not to deviate by no other means. This solitary reason would suffice by itself to overrule the above decisions, the correctness of which stand referred to for consideration by this Bench. All the more so when, there is no reason to doubt the correctness of the decision in A.R.Antulay's case (supra) and this Bench concurs with the principles laid down therein."

The counsel would then refer to ***N.Meera Rani Vs. Govt. of T.N. And another,*** AIR 1989 Supreme Court 2027 to urge that decision by the Constitutional Bench has to rank superior when compared to any subsequent decision by the Benches comprised of lesser number of Judges. In this case, the Hon'ble Supreme Court has observed that "the starting point is the decision of a Constitution Bench in Rameshwar Shaw v. District Magistrate, Burdwan, (1964) 4 SCR 921; (AIR 1964 SC 334). All subsequent decisions which are cited have to be read in the light of this Constitution Bench decision since they are decisions by Benches comprised of lesser number of

Judges. It is obvious that none of these subsequent decisions could have intended taking a view contrary to that of the Constitution Bench in Rameshwar Shaw's case (supra).” The Court further went on to observe that “none of the observations made in any subsequent case can be construed at variance with the principle indicated in Rameshwar Shaw's case (supra) for the obvious reason that all subsequent decisions were by benches comprised of lesser number of Judges.”

In contrast, learned Advocate General would refer to the case of ***Suganthi Suresh Kumar Vs. Jagdeshan,*** (2002) 2 Supreme Court Cases 420 to say that it is not for the High Court to by-pass legal proposition laid down by the Supreme court. The Hon'ble Supreme Court has held in this case that it is impermissible for the High Court to over-rule the decision of the Apex Court on the ground that the Supreme Court laid down the legal position without considering any other point. The Supreme Court also observed that it is not only a matter of discipline for the High Courts in India but is a mandate of the Constitution as provided in Article 141 of the Constitution. There is no doubt that it is rather impermissible for High Court to question even the correctness of any decision of the Supreme Court and this position would not be open to any debate. It may, however, require a notice that Suganthi Suresh Kumar's case (supra) did not deal with a situation where the question arose about the binding nature of a law laid down by the Constitutional Bench of the Hon'ble Supreme Court and another Bench of the Court having lesser Bench strength. Though may sound academic, but if High Court prefer a decision rendered by a Bench of lesser Judges in

preference to a law laid down by a Constitution Bench, then allegation may come that the High Court has decided a case by ignoring the decision of a Constitutional Bench, equally binding on the High Court in terms of Article 141 of the Constitution of India. Reference is also made to the case of ***Rapti Commission Agency Vs. State of U.P., and others***, (2006) 6 Supreme Court Cases 522, where the Hon'ble Supreme Court deprecated the action of the High Court in adjudging the correctness of the view of the Hon'ble Supreme Court. This was again a case where the High Court has commented about the correctness of the judgment by observing that several larger Benches decisions were not considered and this approach of the High Court was termed inappropriate. There can not be any debate on this but no such issue has arisen in the present case. Reference is then made to ***C.N.Rudramurthy Vs. K.Barkathulla Khan and others,*** (1998) 8 Supreme Court Cases 275. In this case, the Hon'ble Supreme Court has observed that a law laid down in a particular case is the applicable law, it is not open to the High Court to consider or rely on any supposedly conflicting decision. Relying upon the ratio in this case, the Advocate General has stressed that this Court has only to take into consideration the law laid down in Adri Dharan Das's case (supra) and no other, even if this may supposedly be in conflict with any other decision, including the decision rendered by the Constitutional Bench of the Apex Court.

I can not subscribe to the view convassed by the Advocate General. Precedents are in plenty which would run contrary to this proposition propounded on behalf of the State. In ***Union of***

India and another Vs. K.S.Subramanian, AIR 1976 SC 2433, it is held by Supreme Court that it is a duty of High Court to follow opinion expressed by larger benches of Supreme Court and this practice is followed by Supreme Court and has crystalized into a rule of law. In N.Meera Rani's case (supra), it was also held that “none of the observations made in any subsequent case can be construed at variance with the principle indicated in Rameshwar Shaw's case (supra) for obvious reason that all subsequent decisions were by Benches comprimised of lesser number of Judges.” Thus, the view that Adri Dharan Das's case (supra) is to be followed even if it is in conflict with a ratio laid down in Constitutional Bench decision in Gurbaksh Singh Sibbia's case (supra) would not be a correct view of law convassed. I am not going into the aspect whether observation made while dismissing S.L.P. would lay down any law. The issue here is simple and it emanates from the observations made by the Hon'ble Supreme Court while dismissing the S.L.P. filed by the State. While dismissing the S.L.P., the Hon'ble Supreme Court observed that the present application is to be disposed of `**in accordance with law'** and while doing so, this Court is `**to keep in view'** the principle laid down in Adri Dharan Das's case (supra). It is convassed before me by counsel for the petitioners that if Adri Dharan Das's case (supra) is read in the light of submissions made by the Advocate General, then it may appear to lay down a ratio contrary to the law laid down by the Constitutional Bench in Gurbaksh Singh Sibbia's case (supra). In this context, it would be appropriate to notice what exactly the Advocate General has to say in regard to the ratio of law laid down by the Hon'ble Supreme Court in Adri Dharan

Das's case (supra). He at one stage convassed that Adri Dharan Das's case (supra) seems to have held that a power to grant stay of arrest in anticipation thereof is not available and that such an order, if at all required, can be for a limited duration, say a few days to enable the accused to move the regular Court in terms of Section 439 Cr.P.C. When pointed out that there may be a contradiction in this submission, as he can not say that there is no power to stay arrest and at the same time maintain that it has to be for a limited duration. He then changed stance a bit to submit that such bail can be granted for a very limited duration, say for a few days to enable the applicant to approach regular Court. On this, the counsel for the petitioner joins serious issues with the Advocate General by referring to the case of Gurbaksh Singh Sibbia (supra). Since conflict between the parties in regard to the jurisdiction of this Court to grant anticipatory bail become narrow and they were at variance mainly with regard to exercise of such jurisdiction concerning the duration of such bail, there may not be a need to decide about power of the High Court to grant anticipatory bail. In fact, no discussion in this regard is needed, the issue having been fully settled by the Constitutional Bench decision of the Hon'ble Supreme Court in Gurbaksh Singh Sibbia's case (supra). It would otherwise also be too late in a day to urge that there is no such power available with the High Court or Court of Sessions in view of a specific provision made in this regard in the form of Section 438 Cr.P.C., which has been brought on the statute book with due deliberation in this regard. The observations of the Law Commission in regard to necessity of introducing such a provision in the Code may be noticed:-

> "The suggestion for directing the release of a person on bail prior to his arrest (commonly) known as "anticipatory bail") was carefully considered by us. Though there is a conflict of judicial opinion about the power of a court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail."

The Constitutional Bench was further to observe in Gurbaksh Singh Sibbia's case (supra) that there are no constrains as were engrafted by the Full Bench of this Court in regard to the powers conferred by Section 438 Cr.P.C. in the exercise of this power. While saying so, it is held:-

> "12. We find ourselves unable to accept, in their totality, the submissions of the learned Additional

Solicitor-General or the constraints which the Full Bench of the High Court has engrafted on the power conferred by Section 438. Clause (1) of Section 438 is couched in terms, broad and unqualified. By any known canon of construction, words of width and amplitude ought not generally to be cut down so as to read into the language of the statute restraints and conditions which the legislature itself did not think it proper or necessary to impose. This is especially true when the statutory provision which falls for consideration is designed to secure a valuable right like the right to personal freedom and involves the application of a presumption as salutary and deep grained in our criminal jurisprudence as the presumption of innocence. Though the right to apply for anticipatory bail was conferred for the first time by Section 438, while enacting that provision the legislature was not writing on a clean slate in the sense of taking an unprecedented step, insofar as the right to apply for bail is concerned. It had before it two cognate provisions of the Code: Section 437 which deals with the power of courts other than the Court of Session and the High Court to grant bail in non-bailable cases and Section 439 which deals with the "special powers" of the High Court and the Court of Session regarding bail. The whole of Section 437 is

> riddled and hedged in by restrictions on the power of certain courts to grant bail."

Thus, there can not be any matter of doubt that this Court will have power to grant anticipatory bail and such power is not hedged by any condition or constrains. In this regard, reference can be made to the observations of the Constitutional Bench in Gurbaksh Singh Sibbia's case (supra) to the effect that any statutory provision concerned with person's liberty can not be whittled down by reading restrictions and limitations into it. The Hon'ble Supreme Court in this regard so spoke:-

> "26. We find a great deal of substance in Mr.Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision

> contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in Maneka Gandhi's, that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein."

Thus, the Constitutional Bench laid down the principle of liberal interpretation of Section 438 Cr.P.C. in the light of Article 21 of the Constitution of India and went on to hold that even the restrictions contained in Section 437 Cr.P.C., which are generally considered to be relevant under Section 439 Cr.P.C., need not be read into the judicial discretion granted under Section 438 Cr.P.C. Can then some constrains be put on the exercise of power under Section 438 and if it is done, would not it invite challenge of unfair law under Article 21 of the Constitution of India? So, will it be possible to read any requirement of fixing limitation on anticipatory bail and if it is done then will it not be a constrain on the power of the Court? The question then would arise is if such a bail is to enure without any condition in regard to its duration or it is required to be for a limited duration? If it is held that such a bail is to enure for a limited duration, then it may also require to be seen as to what this duration should be or is to be. As per counsel for the petitioners, Constitutional

Bench did go into this aspect, as can be noticed from the following observations made in the judgment:-

> "Should the duration of an order passed under Section 438 (1) be limited in point of time? Not necessarily. The Court may, if there are reasons for doing so, limit the duration of the order to a short period until after filing of an FIR in respect of the matter covered by the order. The applicant may, in such cases, be directed to obtain an order of bail under Section 437 or 439 of the Code within a reasonably short period after the filing of the FIR as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time."

Two things that would emerge from the above noted observations is that it is not necessary to make the operation of the order passed under Section 438(1) limited in point of time, but still this can be so done, which need not to be followed as invariable rule. This would not support the view convassed by counsel for the petitioners that there is a conflict between the decision rendered by the Constitutional Bench in Gurbaksh Singh Sibbia's case (supra) and the law laid down in Adri Dharan Das's case (supra) and other cases. In Gurbaksh Singh Sibbia's case (supra), the Hon'ble Supreme Court apparently had in its view the situation where the bail is sought before registration of an FIR, though person may be apprehending his arrest. In this context, it would be seen that

Constitutional Bench does not appear to be laying down any inflexible rule of law relating to the duration for which anticipatory bail, if granted, is to enure. Even in such case where there is no FIR, this rule of limiting bail is not required to be followed as invariable rule and normal direction is not to limit the duration. Is it then possible to say that such bail should be of a limited duration, when FIR is there for the Court to see? It is seen that while deciding Adri Dharan Das's case (supra), Hon'ble Supreme Court referred to and relied upon ***Salauddin Abdulsamad Shaikh Vs. State,*** (1996) 1 SCC 667, ***Nirmaljeet Kaur Vs. State of M.P.,*** (2004) 7 SCC 558 and ***Sunita Devi Vs. State of Bihar,*** (2005) 1 SCC 608. The view expressed by Hon'ble Supreme Court in ***K.L.Verma Vs. State,*** (1998) 9 SCC 348 was noticed and also the fact that Nirmaljeet Kaur and Sunita Devi's cases (supra) had noted certain grey areas in this judgment mainly relating to the observation reading “or even a few days thereafter to enable accused persons to move the higher Court if they so desire.” It is observed by the Supreme Court that the requirement of Section 439 of the Code is not wiped out by the above noted observations. Commenting upon the gray areas noticed in K.L.Verma's case (supra), the Hon'ble Supreme Court in Sunita Devi's case (supra), held as under:-

> “12. Obviously, the requirement of Section 439 of the Code is not wiped out by the above observations. Section 439 comes into operation only when a person is “in custody”. In K.L.Verma case reference was made to Salauddin case. In the said case there was no such indication as given in K.L.Verma case that a few days can

be granted to the accused to move the higher court if they so desire. The statutory requirement of Section 439 of the Code cannot be said to have been rendered totally inoperative by the said observation."

Primarily the ratio of all these decisions is that the regular Court can not or should not be allowed to be by-passed. The requirement of limiting the duration, thus, arise in relation to the requirement of approaching the regular Court. Issue of the duration of anticipatory bail appears to have been gone into by Constitutional Bench. Some observations are made in Salauddin's case (supra) also, which are as under:-

"Anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed and that is the reason why the High Court very rightly fixed the outer date for the continuance of the bail and on the date of its expiry directed the petitioner to move the regular court for bail. That is the correct procedure to follow because it must be realised that when the Court of Session or the High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offender. It is, therefore, necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it

to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted."

Thus, the requirement of limiting the duration of bail is clearly co-related to the need to approach the regular Court.This view subsequently is noticed and basically reiterated in Nirmaljeet Kaur's case, Sunita Devi's case and Adri Dharan Das's case (supra). Recently, the Hon'ble Supreme Court again reiterated this view in ***D.K.Ganesh Babu Vs. P.T.Manokaran and others,*** 2007 (2) RCR (Crl.) 161. In all these judgments, reference is made to Gurbaksh Singh Sibbia's case (supra). So all these cases appears to be laying down a common principle of law and in fact are reiteration of the view expressed in each of the judgment, which followed the earlier one. The Advocate General has sought support from the observation made by the Hon'ble Supreme Court recorded in Adri Dharan Das's case (supra) to the effect that while dealing with application under Section 438 of the Code, the Court can not restrain arrest to question the very existence of power under the Section. From this, he would contend that no order granting anticipatory bail perhaps can be made. To my mind, he does not appear to have correctly appreciated the issue discussed and adjudicated upon by the Hon'ble Supreme Court in Adri Dharan Das's case (supra) in this regard. This question was posed by the Supreme court in Para 17 of the judgment to the effect that "whether a Court can pass an interim order not to arrest the applicant where the application under Section 438 of the code is pending disposal and then went on to answer the same in the

following terms:-

> "18. In the instant case no application for protection in terms of Section 438 of the Code is pending. What the appellant can do after surrendering to custody on 17-3-2005, is to file an application in terms of Section 437 or 439, as the case may be. Even otherwise, the direction which a court can issue under Section 438 of the Code is that in the event of arrest of an accused on an accusation of committing a non-bailable offence, he shall be released on bail subject to such conditions as the court may deem fit to impose. An application under Section 438 of the Code can be moved only by a person who has not already been arrested. Once he is arrested, his remedy is to move the court concerned either under Section 437 or Section 439 of the Code. In the very nature of the direction which the court can issue under Section 438 of the Code, it is clear that the direction is to be issued only at the pre-arrest stage. The direction becomes operative only after arrest. The condition precedent for the operation of the direction issued is arrest of the accused. This being so, the irresistible inference is that while dealing with an application under Section 438 of the Code the court cannot restrain arrest."

If these observations are read as convassed by the Advocate General, then the whole concept of grant of anticipatory bail, as legislated under Section 438 Cr.P.C., would be rendered

redundant and so too the observations of the Hon'ble Supreme Court made in the cases of Salauddin, Nirmaljeet Kaur, Sunita Devi, Adri Dharam Das and D.K.Ganesh Babu (supra), to the effect that protection in terms of Section 438 Cr.P.C. is to be for a duration during which the regular Court is to be moved for a bail. While making observation in regard to power to restrain arrest, the Court apparently was drawing distinction between power to grant bail and the order restraining the arrest. It was not without any reason that Hon'ble Supreme Court in Adri Dharan Das's case (supra) was to observe “the object which is sought to be achieved by Section 438 of the Code is that the moment a person is arrested, if he has already obtained an order from the Court of Session or the High Court, he shall be released immediately on bail without being sent to jail.” It would be reasonable to infer that the observation of the Hon'ble Supreme Court in Adri Dharan Das's case (supra) about power not to restrain arrest appears to have been made while answering submissions raised in this case by the counsel appearing for the appellant to the effect that if the prayer for protection in terms of Section 438 of the Code is not accepted, then the appellant may be permitted to surrender before the Court concerned and apply for regular bail. The issue relating to power of the Court to grant protection while directing a person to apply for regular bail, thus, came into discussion and adjudication. In this context, the observation of the Hon'ble Supreme Court in this case, as reproduced above, may be seen. In this para only the Hon'ble Supreme Court has clearly observed that the direction, which a Court can issue under Section 438 of the Code is that in the event of arrest

of an accused or accusation of committing a non-bailable offence, he shall be released on bail subject to such conditions as the Court may deem fit to impose. It was also observed that such an application can only be moved by a person who has not already been arrested. Thus, the distinction in regard to the power of the Court to restrain arrest and grant bail are clearly noticeable from Adri Dharam Das's case (supra). There is, thus, no need to pursue the reasoning convassed by the Advocate General that there is any restriction on the power of the Court while granting pre-arrest bail. This issue would not arise from any observation made in Adri Dharam Das's case (supra) and rather stands adjudicated in Gurbaksh Singh Sibbia's case (supra), as can be seen from the observations reproduced from the judgment in the earlier part of this order. I am, thus, inclined to view that this Court would have power to grant pre-arrest bail in a non-cognizable offence in terms of Section 438 Cr.P.C., though the Court is not to pass any order, restraining the investigating agency to arrest any person. Power of arresting a person in a non-cognizable case is available with the investigating agency whereas the Court under Section 438 Cr.P.C. is fully empowered and competent to grant bail in the event of person's arrest.

The question, thus, which remains to be answered is whether the anticipatory bail is to be granted for a limited duration and if so what should be its duration? In view of the stand taken by the respective parties, there may not be any requirement of elaborate discussion on this issue. The learned Advocate General submits that anticipatory bail even if granted has to be for a very limited duration,

say a few days and thereafter the accused is to appear before the regular Court and ask for bail under Section 439 Cr.P.C. Counsel for the petitioner, however, would not subscribe to this view but would say that it is in the discretion of the Court to limit the duration of anticipatory bail and this need not be of such a limited duration as argued by the Advocate General. It may be upto a duration when there is any change in fact situation like presentation of challan etc.

What is to happen where trial Court is not seized of the case? What is going to be there before the Court till submission of challan? Has bail to be for a limited duration in such a situation? Though there was a discussion in regard to the duration while granting anticipatory bail in the case of Gurbaksh Singh Sibbia's case (supra) and it was also observed that normal rule should be not to limit the operation of the order in relation to period of time, yet in some of the subsequent decisions noted above, the Hon'ble Supreme Court has made some observation in this regard. These are to the effect that such an order can not enure for times to come and is required to be for some duration co-relating it to the by-passing of regular Court. Are these observations of the Hon'ble Supreme court in conflict with any observations made by the Constitutional Bench? What was held in Gurbaksh Singh Sibbia's case (supra) is that it is not necessary to limit the duration of order under Section 438 in point of time but it can, in the discretion of the Court, be so done and the person can be directed to obtain the order of bail under Section 437 or 439 Cr.P.C. Thereafter, it is said that this need not be followed as an invariable rule and that normal rule should be not to limit the operation. Since the Constitutional Bench

decision has not laid down any bar on the discretion of the Court to limit the duration of anticipatory bail, it would not be possible to say that there is any conflict with the subsequent decision rendered by the Hon'ble Supreme Court in this regard. The submissions made by counsel for the petitioners regarding the conflict need not, thus, be perused any further. It can not be disputed that the Court empowered to grant anticipatory bail under Section 438(1) would have discretion to condition this order with any appropriate conditions, which may include it's restricted duration. Ofcourse, this will always dependent upon the facts and circumstances of each case and the requirement of keeping in view a balance between the liberty of an individual and the right of investigating agencies to perform their duties in this regard. As already noticed, Constitutional Bench in Gurbaksh Singh Sibbia's case (supra) and some other judgments, reference of which would be made subsequently, have interpreted Section 438 Cr.P.C. in the light of Article 21 of the Constitution of India by saying that liberal interpretation of the Section is the need. Thus, can a view advanced by the Advocate General that such a bail, if granted, has to be for a limited duration, say a few days, be accepted? His further submission that this court is to adjudicate the same keeping in view Adri Dharam Das's case (supra) and not to look for anything else also seems to be mis-conceived appreciation of the order of Hon'ble Supreme Court, Annexure R-1. The Hon'ble Supreme Court, while dismissing the S.L.P., categorically held that the application of the petitioner is to be decided in accordance with law and while doing so the principle of law laid down in Adri Dharam Das's case (supra) is to be kept in view. If the petition is to be decided in accordance with

law, the Court, in my view, would certainly be entitled to look for the legal principles which are established and settled. Ofcourse, the Court has to keep the principle of law laid down in Adri Dharam Das's case (supra) in view. I have not been able to persuade myself to view that the Hon'ble Supreme Court would ever lay down or mean to convey that any petition can be decided by ignoring the settled law. Nothing of this sort can be read into the order passed by Hon'ble Supreme Court, while dismissing the S.L.P. filed by the State in this case. While deciding this petition, ofcourse the court has to keep in view the principles of law laid down in Adri Dharam Das's case (supra). It is in this context, that the Court may now to see the principle of law laid down in Adri Dharam Das's case (supra). Since the other aspects of the issues raised before me have already been considered, this case now is to be seen in the light of submissions made that such a bail has to be for a limited duration of few days.

The requirement of making an order limited in duration came to be considered in Salauddin's case (supra). This was a case where the High Court has initially granted anticipatory bail to enure upto a particular date and thereafter directed him to file an application for regular bail, which was in `seisin' of the criminal case pending against him. It is against this order that he filed a S.L.P. before the Hon'ble Supreme Court, when it was observed that anticipatory bail order should be for a limited duration only and ordinarily on the expiry of that duration or extended duration, the Court granting anticipatory bail should leave it to the regular Court to deal with the matter on appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is

submitted. Then came K.L.Verma'case (supra). In this case, High Court again granted anticipatory bail upto a particular date and thereafter directed the petitioner therein to apply for regular bail. While doing so, the High Court had relied upon Salauddin's case (supra). The Hon'ble Supreme Court, while deciding K.L.Verma's case (supra) has explained Salauddin's case (supra), as can be seen from the following observations:-

> "It was, therefore, pointed out that it was necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted. By this, what the Court desired to convey was that an order of anticipatory bail does not enure till the end of trial but it must be of limited duration as the regular court cannot be bypassed. The limited duration must be determined having regard to the facts of the case and the need to give the accused sufficient time to move the regular court for bail and to give the regular court sufficient time to determine the bail application. In other words, till the bail application is disposed of one way or the other the court may allow the accused to remain on anticipatory bail. To put it differently, anticipatory bail may be granted for a duration which may extend to the date on which the bail application is disposed of or even a few

days thereafter to enable the accused persons to move the higher court, if they so desire. This decision was not intended to convey that as soon as the accused persons are produced before the regular court the anticipatory bail ends even if the court is yet to decide the question of bail on merits. The decision in Salauddin case has to be so understood."

A fact of significance, which may need a notice herein is that both the cases were decided by a Bench headed by A.M.Ahmdi, J. the then Chief Justice of India. The view taken in K.L.Verma's case (supra) was held to be per incuriam in Nirmaljeet Kaur's case (supra) as under:-

"20. In Salauddin case also this Court observed that the regular court has to be moved for bail. Obviously, an application under Section 439 of the Code must be in a manner in accordance with law and the accused seeking remedy under Section 439 must ensure that it would be lawful for the court to deal with the application. Unless the applicant is in custody his making application only under Section 439 of the Code will not confer jurisdiction on the court to which the application is made. The view regarding extension of time to "move" the higher court as culled out from the decision in K.L.Verma case shall have to be treated as having been rendered per incuriam, as no reference was made to the prescription in Section 439 requiring the accused to be in custody. In State v. Ratan Lal Arora it was held that where in a case the decision

has been rendered without reference to statutory bars, the same cannot have any precedential value and shall have to be treated as having been rendered per incuriam. The present case stands at par, if not, on a better footing. The provision of Section 439 do not appear to have been taken note of."

It may require notice here that Law Commission, while talking about the need for legislating provisions for anticipatory bail said "....there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail." Will not the insistence of surrendering and applying for regular bail even after grant of anticipatory bail run counter to the need felt for making a provision for grant of anticipatory bail? This need for making provision for anticipatory bail was felt in the background as noticed by the Law Commission of political rivalry. The decision rendered in Salauddin's case (supra), however, was relied upon in the cases of Nirmaljeet Kaur (supra), Sunita Devi (supra), Adri Dharam Das (supra) and D.K.Ganesh Babu (supra). While holding the view taken in K.L.Verma's case (supra) to be per incuriam, the Hon'ble Supreme court in these cases noticed the grey areas, as already referred to above and then held that same is per incuriam. It is also noticed by the Hon'ble Supreme Court in Nirmaljeet Kaur's case (supra) that in K.L.Verma's case (supra), reference was made to Salauddin's case (supra) and there was no indication in Salauddin's case (supra) as given in K.L.Verma's case. It is, thus, obvious that in the subsequent decisions like Nirmaljeet Kaur (supra), Sunita Devi (supra), Adri Dharam Das (supra) and D.K.Ganesh Babu (supra), the case of

Salauddin (supra) has been followed and approved. It is seen that the decision in K.L.Verma's case (supra) was rendered by Bench of two Judges and so too are the subsequent cases, which have noticed grey areas therein. It is not within the domain of this Court to say that these decisions could not have held the decision rendered by Judges of same strength to be per incurium but the counsel for the petitioners has said so. Full Bench decision of Madras High Court in Crl.O.P.(MD) No.2383 of 2007 dated 18.7.2007 has been placed before me, which has dealt with a similar predicament. After discussing in detail various judgments like Adri Dharan Das's case (supra), K.L.Verma's case (supra), Salauddin's case (supra) and the Constitutional Bench decision in Gurbaksh Singh Sibbia's case (supra), the Full Bench of Madras High Court has ruled that High Court (Madras) and the Court of Sessions in the State have to follow the Constitutional Bench judgment of the Supreme Court in Gurbaksh Singh Sibbia's case (supra) in preference to the judgments of Salauddin's case (supra), K.L.Verma's case (supra), Sunita Devi's case (supra), Adri Dharan Das's case (supra), D.K.Ganesh Babu's case (supra) etc. ***Union of India and another Vs. K.S.Subramanian,*** AIR 1976 SC 2433 is relied upon to notice the duty on the High Court to follow opinion expressed by larger Bench of the Supreme Court. ***N.Meera Rani's case (supra)*** may also be noticed here, wherein it is held that decision by less number of Judges is to be read in the light of former decision of Constitutional Bench. Hon'ble Supreme Court in the case of ***Union of India and others Vs. Godfrey Philips India Ltd.,*** AIR 1986 SC 806 observed

"we find it difficult to understand, how a Bench of two Judges in Jeet Ram's case could possibly over turn or dis-agree with what was said by another Bench of two Judges in Motilal Sugar Mills' case. If the Bench of two Judges in Jeet Ram's case found themselves unable to agree with law laid down in Moti Lal Sugar Mills case, they could have referred Jeet Ram's case to a larger Bench....."

A fallacy of the argument raised by the Advocate General that this Court has to only look to Adri Dharan Das's case (supra) while deciding the petition, can be seen from his own approach in making reference to various other judgments while opposing the grant of anticipatory bail. Could he do so, if he had been sincere in pursuing this line of reasoning? Justifiably, reference is made to ***Bharat Chaudhary Vs. State of Bihar,*** (2003) 8 SCC 77, wherein it is held that anticipatory bail can be granted even when cognizance is taken or charge-sheet is filed. In Adri Dharan Das's case (supra) and other cases like Nirmaljeet Kaur (supra), Sunita Devi (supra), and D.K.Ganesh Babu (supra), the Hon'ble Supreme Court had followed Salauddin's case (supra). Adri Dharan Das's case (supra) has been discussed and analyzed by me above. The observation in regard to restrain on the power to arrest obviously is made in the context as already noted. Nothing can be noticed in this judgment, which would hedge the powers of the Court to grant anticipatory bail under Section 438 Cr.P.C. The observation in regard to first going into custody while applying for regular bail was made in the context of submissions made by counsel appearing in the said case on behalf of the appellant therein. This aspect has also been noticed above. Adri Dharan Das's case (supra), while following Salauddin's case

(supra) has held that order under Section 438 (1) Cr.P.C. has to be for a limited duration and thereafter the regular Court is required to be approached. No observation is found in regard to the extent of duration for which this anticipatory bail is to enure. Though these subsequent cases (Nirmaljeet Kaur (supra), Sunita Devi (supra), Adri Dharam Das (supra) and D.K.Ganesh Babu (supra) found some grey areas in the view taken by the said Court in K.L.Verma's case (supra), yet there is no such grey area found or noticed in the judgment of Salauddin's case (supra). The principle that can be culled out of Adri Dharan Das's case (supra), in my view, is that a regular Court can not be by-passed by an order under Section 438 Cr.P.C. and in that context, it is said that duration of the order is to be limited and thereafter the person is to approach the regular Court which he can not by-pass. The judgment nowhere lays down the duration of this limited period, as convassed by the Advocate General, which, according to him, is for few days. In fact, this part of the submission made by the Advocate General appears to be contrary to what is held in Salauddin's case (supra). In regard to the extent of duration Adri Dharan Das's case (supra) has followed Salauddin's case (supra), as can be seen from the following observations:-

> “15. If the protective umbrella of Section 438 is extended beyond what was laid down in Salauddin case the result would be clear bypassing of what is mandated in Section 439 regarding custody. In other words, till the applicant avails remedies up to higher courts, the requirements of

Section 439 become dead letter. No part of a statute can be rendered redundant in that manner."

It would be appropriate to see the ratio emerging from Salauddin's case in this regard. The relevant view expressed by the Hon'ble Supreme Court in Salauddin's case (supra) has been noted above. It is seen that the Court where criminal case was pending was in `seisin' and investigation in the case had made progress, and directions were given to the petitioner therein to file an application for regular bail. Some indication about the duration for such a bail may emerge from the view taken by the Hon'ble Supreme Court in the case. It is said that matter should be left to the regular Court to deal with the same on appreciation of `**evidence placed before it after investigation has made progress or the charge sheet is submitted.'** The argument that even before completion of investigation, the person is required to be directed to go before the regular Court and seek bail under Section 439 Cr.P.C. by granting him a few days, would, in my view, tend to negate the provisions of Section 438 Cr.P.C. While granting order under Section 438 Cr.P.C., the Court would be well competent to grant protection till some viable change takes place i.e. completion of investigation or filing of challan etc. as the regular Court would then be in a position and equipped with to deal with the prayer of bail under Section 439 Cr.P.C. This is the view taken by the Hon'ble Supreme Court in Salauddin's case (supra), which has not been in any manner differed with. This view taken in Salauddin's case (supra) was explained by the Bench in K.L.Verma's case (supra) wherein it had gone to the extent of saying

that duration may extend to the date on which the application is disposed of or even a few days thereafter to enable the accused persons to move the higher Court if they so desire. Explaining Salauddin's case (supra), the Hon 'ble Supreme Court clearly held that “this decision was not intended to convey that as soon as the accused persons are produced before the regular Court, the anticipatory bail ends, even if the Court is yet to decide the question of bail on merits.” The Bench which decided Salauddin's case (supra) had explained it so. Accordingly, the view that has been convassed by the Advocate General that duration of the bail has to be for a few days only and thereafter the accused person is required to approach the regular Court, even if it is not in seisin, can not be accepted. However, there is no dispute that as per Salauddin's case (supra) and other cases in line thereafter have held that an order even if made under Section 438 Cr.P.C. can not be of a nature to enure till the end of trial and has to be for some limited duration. As per Gurbaksh Singh Sibbia's case (supra), it is not necessary to limit the duration but it can be so done and normal rule is not to limit the operation of the order. Thus, it would depend upon the facts in each case for the court to exercise its discretion and pass the order. This duration, in my considered opinion, can be upto the time, when some viable change takes place in fact situation like completion of investigation or filing of challan, as is specifically held in Salauddin's case (supra). Some such observation can be seen from Gurbaksh Singh Sibbia's case (supra), where it is said that “The Court may, if there are reasons for doing so, limit the duration of the order to a short period until after filing of an FIR in respect of the matter

covered by the order. The applicant may, in such cases, be directed to obtain an order of bail under Section 437 or 439 of the Code within a reasonably short period after the filing of the FIR as aforesaid." This discretion to limit the duration of the order under Section 438 Cr.P.C. may not emanate from the Section itself but is emerging from the view taken by the Hon'ble Supreme Court in various judgments. There seems to be no limit on the discretion of the Court to grant an order under Section 438 Cr.P.C. but the same when granted is to be for a duration which can be limited in the discretion of the Court. If any other view is taken or convassed, it would amount to putting fetters on the clear power available under Section 438 Cr.P.C. and may invite valid criticism that restrictions are being imposed on right of life and liberty granted under Article 21 of the Constitution of India. I think the ratio of law laid down in Constitutional Bench decision can be so reconciled with the subsequent view taken by the Hon'ble Supreme Court.

In the background of the afore-mentioned view, let us now proceed to see if having regard to the facts and circumstances of the case, any case for grant of anticipatory bail sought by the petitioner is made out or not and if so, it is to be of any limited duration?

While granting interim bail to the petitioners under Section 438 Cr.P.C., reference in detail to the contents of the FIR was made. It was also noticed that the allegation of political vendetta is made by the petitioners for bringing their names in this case as accused. In this context, it was specifically queried from the Advocate General as to what material by now is collected by investigating agency, for which the need for custodial interrogation of the petitioners would be

pressed. The Advocate General was rather loud in saying that this is the biggest scam in country and as such, right of the investigating agency to investigate the case should not be curtailed. To counter the allegation of political vendetta, the Advocate General says that the case was initiated during the tenure of petitioner No.1 and it is being pursued after the change of Government and hence, it can not be said that this has arisen out of any vengeance against the petitioners. Need to see the gravity of a case vis-a-vis the allegation against a particular person was emphasized during the course of arguments. The case may be of a scam for a significant magnitude but what is to be seen is the nature of allegation and the prima-facie material that is available against the petitioners. No material is pointed out against petitioner No.2. It was conceded by the Advocate General that the statement of Chetan Gupta and pen drive that is recovered from him are the other materials that are now available with the investigating agency, for which the custodial investigation is needed. During the course of arguments, the Advocate General did convey that there is other material available in the file, which he did not wish to share in the presence of the petitioners' counsel and, thus, passed it on to the Court for perusal. He also points out that the petitioner has failed to supply documents and answer the interrogatories that were given to him in writing and, thus, was not cooperating with the investigation. On this, Mr.Ghai, petitioners' counsel joined in to rebut the Advocate General. He says that all the documents asked for and the questions addressed have been answered by petitioner No.1. He would further say that the submission for custodial interrogation of the petitioner on the basis of

what has been stated by Chetan Gupta or pen drive recovered from him is not justified in fact and law. He would term this statement, even if confession, to be a statement of co-accused and pen drive to be entries in diary having no evidentiary value. He has also drawn my attention to an order passed in Civil Writ Petition No.1487 of 2006, which was filed by 8 Members of Parliaments belonging to present ruling party including Mr.Sukhbir Singh Badal, son of the present Chief Minister. The prayer made in the petition was for quashing the report given by B.S.Nehra, Commission of Enquiry, constituted by petitioner No.1 while he was the Chief Minister to enquire into the allegation of some Hawala transactions alleged to have been carried out by his son and said Chetan Gupta. As per the counsel, Chetan Gupta was one of the respondents against whom the direction was sought in this writ petition. He would accordingly say that Chetan Gupta is a co-accused against whom a direction was sought for investigation by CBI relating to Hawala transactions, which has now statedly been brought out after his arrest. This writ petition was dismissed by a Division Bench of this Court and it is observed “as a matter of judicial restraint all that we wish to record is that the filing of instant writ petition may not have been as innocent as it has been projected.” The Division Bench has also noticed that Enforcement Directorate, being an independent investigating agency, has the means of effectively conducting probe and as such, the prayer made for investigation by CBI was held to be without any justification. The counsel would also correlate this aspect with the vengeance with which the case is now pursued against the petitioners. As per him, when the present ruling party could not succeed in their efforts to

have investigation against the petitioners by CBI, they have now racked up the same issue by registering the present FIR and have attempted to correlate it with the transactions, which have already been investigated by Commission of Enquiry. He would accordingly allege political vendetta and victimization of the petitioners. He has also referred to an order passed by the Division Bench of this Court in Civil Writ Petition No.9434 of 2007, was filed by Bharat Inder Chahal, another co-accused of the petitioners, seeking transfer of investigation of the present FIR in this case. This order is placed before me by the Advocate General mainly to urge that prayer of the co-accused for investigation by independent agency is declined, which would show that the course of investigation is being pursued by the Vigilance Bureau of the State is in the proper and right direction. There is no such indication in the order. Using the same order to his advantage, Mr.Ghai has referred to the stand taken by the Advocate General before the Division Bench, for which the Court, as per the counsel, declined to transfer the investigation. Statement made by the Advocate General before the Division Bench is recorded to the effect that the investigation in case FIR No.5 dated 23.3.2007 under Sections 409, 420, 467, 468, 471, 120-B IPC and Section 7, 13(1)(c)(d) read with Section 13(2), 14 of the P.C.Act, 1988, is complete. From this, Mr.Ghai would urge that where is the need of any custodial interrogation of the petitioners in this case, since as per the statement made by the Advocate General, the investigation in this case is complete. Taken by surprise, though it was his statement, the Advocate General did not offer any response to this. State has now made amends to this by moving an application to get

the order corrected to say that this statement was meant for FIR No.105. Though this order is now corrected but Mr.Ghai would impute motive and says that it is an after thought to get out of an uncomfortable situation by the Advocate General as statement qua FIR is already contained in the order separately.

It is now convassed by the Advocate General that power exercisable under Section 438 Cr.P.C. is extra ordinary in character and so should be exercised in exceptional cases to say that bail should be declined to the petitioners. In this regard, he seems to be relying upon some observations made in Adri Dharan Das's case (supra), where the Court observed that power exercisable under Section 438 is somewhat extra ordinary in character and it is used only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty, then power is to be exercised under Section 438. These observations are apparently flowing from ***Bala Chand Jain Vs. State of Madhya Pradesh,*** (1976) 4 SCC 572, where A.C.Gupta, J. had observed that “this power of granting `anticipatory bail' is somewhat extraordinary in character and it is only in exceptional cases where it appears that a person might be falsely implicated, or a frivolous case might be launched against him, or “there are reasonable grounds for holding that a person accused of an offence is not likely to abscond or otherwise misuse his liberty while on bail” that such power is to be exercised.” This case in fact had been explained by the Constitutional Bench in Gurbaksh Singh Sibbia's case (supra). Noticing that the Full Bench of this Court, while deciding Gurbaksh

Singh Sibbia's case (Supra) had heavily leaned on Bala Chand Jain's case (supra) held that observation in this case regarding the extra ordinary character of this power and that it is to be exercised in exceptional cases was made in altogether different context and on an altogether different point. This is noticeable from the following observations in Gurbaksh Singh Sibbia's case (supra):-

> "25. We hold the decision in Balchand Jain in great respect but it is necessary to remember that the question as regards the interpretation of Section 438 did not at all arise in that case. Fazal Ali, J. has stated in paragraph 3 of his judgment (SCC para 10) that "the only point" which arose for consideration before the court was whether the provisions of Section 438 relating to anticipatory bail stand overruled and repealed by virtue of Rule 184 of the Defence and Internal Security of India Rules, 1971 or whether both the provisions can, by the rule of harmonious interpretation, exist side by side. Bhagwati, J. has also stated in his judgment, after adverting to Section 438 that Rule 184 is what the court was concerned with in the appeal (SCC para 3). The observations made in Balchand Jain regarding the nature of the power conferred by Section 438 and regarding the question whether the conditions mentioned in Section 437 should be read into Section 438 cannot therefore be treated as concluding the points which arise directly for our consideration. We agree, with respect, that the power conferred by Section 438 is of an extraordinary character

> in the sense indicated above, namely, that it is not ordinarily resorted to like the power conferred by Sections 437 and 439. We also agree that the power to grant anticipatory bail should be exercised with due care and circumspection but beyond that, it is not possible to agree with the observations made in Balchand Jain in an altogether different context on an altogether different point."

It was in this context that Constitutional Bench in Gurbaksh Singh Sibbia's case (supra) held that no restriction should be imported into the provisions of section 438 Cr.P.C. and that this is required to be saved and not jettisoned. The Constitutional Bench even went to the extent saying that no limitation, as mentioned in Section 437 or 439 Cr.P.C. could be read into Section 438 Cr.P.C. Relevant observations in this regard are as under:-

> "21.The High Court says in its fourth proposition that in addition to the limitations mentioned in Section 437, the petitioner must make out a "special case" for the exercise of the power to grant anticipatory bail. This virtually, reduces the salutary power conferred by Section 438 to a dead letter. In its anxiety, otherwise just, to show that the power conferred by Section 438 is not "unguided or uncanalised", the High Court has subjected that power to a restraint which will have the effect of making the power utterly unguided. To say that the applicant must make out a "special case" for the exercise of the power to grant anticipatory bail is really to say nothing. The applicant has

> undoubtedly to make out a case for the grant of anticipatory bail. But one cannot go further and say that he must make out a "special case". We do not see why the provisions of Section 438 should be suspected as containing something volatile or incendiary, which needs to be handled with the greatest care and caution imaginable. A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail."

Since Bala Chand Jain's case (supra) was explained by the Constitutional Bench, as noted above, the notice of some observations made by by Adri Dharan Das's case (supra) may not appear relevant to decide the nature of this concession and the circumstances in which it is to be exercised. This would stand concluded in view of the law laid down in Gurbaksh Singh Sibbia's case (supra). In fact, the Constitutional Bench did also make relevant observations as to whether such a bail is to be granted and the consideration which need to be weighed while granting an order in this regard. The Bench held as under:-

"The question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail. Therefore, the High Court and the Court of Session to whom the application for anticipatory bail is made ought to be left free in the exercise of their judicial discretion to grant bail if they consider it fit so to do on the particular facts and circumstances of the case and on such conditions as the case may warrant. Similarly, they must be left free to refuse bail if the circumstances of the case so warrant, on considerations similar to those mentioned in Section 437 or which are generally considered to be relevant under Section 439 of the Code. The judicial discretion granted under Section 438 should not be read down by reading into the statute conditions that are not to be found therein. The courts have to be allowed a little free play in the joints if the conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly, these are higher courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because, discretion has always to be exercised by courts judicially and not according to whim, caprice or

fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges which have to be met."

It was also observed that there are several other consideration too numerous to enumerate, the combined effect of which must weigh with the court while granting or rejecting anticipatory bail. The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the State" are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail. Thus, to say that order under Section 438 Cr.P.C. is to be granted only when exceptional case is made out or that it is an extra ordinary in character may not convey the correct view. This discretion has been left to be exercised by the Court like High Courts and Sessions Courts having regard to the circumstances of each case, was also found to be without any risk as the same had been vested in the higher Court subject to appeal and revision (See Gurbaksh Singh Sibbia's case in this regard).

It is now to be seen whether any case for grant of concession under Section 438 Cr.P.C. to the petitioner is made out or not? It is also to be seen if this concession is to be given to him, then what should be the duration thereof? The nature of the allegations made in the FIR were noticed at the time of making an

interim order, granting protection to the petitioner. The State has now relied upon a statement made by Chetan Gupta and the pen drive that has been recovered from him. The objection to this piece of material, as raised by counsel for the petitioners, is already noticed. The file which has been left for perusal of the Court has been minutely seen by me. Nothing could be noticed therein, which is not already in public domain in the form of statement given by Chetan Gupta and the pen drive, which has been extensively covered by the media. The Advocate General has made a serious grouse in regard to the action of petitioner No.1 in not handing over the original enquiry back which was allegedly held by Vigilance when he was Chief Minister. The photostat copy of the enquiry is available in the file handed over to the Court. It is not , as such, understood as to how this is being urged. The objection by counsel for the petitioners that the statement of Chetan Gupta and the pen drive are no material to seek permission to interrogate the petitioners in custody and so too the objection that the petitioners had remained evasive in answering the interrogatories. The same needs to be appreciated in the light of the constitutional protection against self-incrimination as available under Article 20 of the Constitution of India. In this regard, reference can be made to the case of ***Nandini Satpathy Vs. P.L.Dani and another,*** (1978) 2 Supreme Court Cases 424. Some telling observations in regard to the right of an accused to remain silent vis-a-vis the right of investigating agencies to seek answers to the interrogatories as per Section 161 of the Code of Criminal Procedure, were made in this case. The Hon'ble Supreme Court went on to hold that Section 161 Cr.P.C. is a parliamentary gloss on

the constitutional clause in Article 20(3). It was observed “the area covered by Article 20(3) and Section 161 (2) of Cr.P.C. is substantially the same. So much so, we are inclined to view, terminological expansion apart, that Section 161 (2) of Cr.P.C. is a parliamentary gloss on the constitutional clause.” It is in this context, the Hon'ble Supreme Court in Nandini Satpathy's case (supra), considered the aspect of need of investigation vis-a-vis the citizen's right. In fact, this case would also be a answer to a submission made by the Advocate General in regard to the advantage of interrogating in custody for eliciting more useful information and material, which, as per him, is to be kept in view, as per the observation made by Hon'ble Supreme Court in ***State represented by the C.B.I. Vs. Anil Sharma,*** (1997) 7 Supreme Court Cases 187. While elaborating that custodial interrogation is more elucidative then the one held in respect of a person protected by Court's order, he attempted to convey that psychological and environmental pressure atleast would be there if investigation is done without protective order. This subtle line was advocated as he was bound to know the normal working and methods used by the police in this regard. Even while advancing psychological angle to justify custodial investigation, the Advocate General seems to be ignoring the law laid down in Nandini Sathathy's case (supra). In fact, the Hon'ble Supreme Court in Nandini Sathathy's case (supra) was to observe that a compelled testimony is an evidence procured not merely by physical threats or violence but by a psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidating methods and the like. Thus, this justification advanced by the learned

Advocate General may not be in tune with the law laid down by the Hon'ble Supreme Court where even such like interrogation was termed as compelled testimony and thus hit by the prohibitive sweep of Article 20(3), the contents of Section 161 of the Code of Criminal Procedure notwithstanding. Reference may also be made here to ***State of Gujarat Vs. Shyamlal Mohanlal Choksi***, AIR 1965 SC 1251 about the rights of an accused against self incrimination regarding directions to supply documents asked for.

The merits of the material collected may not be seen or appreciated to see if need for custodial interrogation of the petitioners is justified. However, from the submissions made before me, need for custodial interrogation apparently is not made out. In fact all considerations which are held relevant for grant of anticipatory bail can be seen in the case of the petitioners. Allegation of political vendetta is apparently available. Petitioners are political rival of the present ruling personalities. During the regime of petitioner No.1, cases were filed against the present Chief Minister, his son (Member of Parliament and President of the Party) and his wife. In turn, now the allegations are coming against petitioner No.1, his wife, son, son-in-law and old and aged mother. Record reveals, son of the present chief Minister had made various attempts to seek various enquiries and investigations against the petitioners earlier also. Legal value of the pen drive notwithstanding, it does not contain any significant record against the petitioners. If the requirement is only to confront the petitioners with the information that is available in the form of statement given by Chetan Gupta, then that may not justify the custody of the petitioners. It is not for me to comment on the

value in law, which is to be scribed to this statement or to the pen drive, which has been termed as entries in the diaries and, thus, not relevant piece of evidence. All this would ultimately be seen by the Court if the trial follows. I may also notice that during the course of his submissions, learned Advocate General did say with emphasis that the petitioners may not be arrested during the course of investigation. The Investigating Agency or the Advocate General has not been able to place any substantial material, which could show the need of any custodial interrogation. In fact, the Advocate General conceded before me that the petitioner was not arrested when he had appeared to join the investigation. It may need a notice that this Court had not passed any order restraining the arrest of the petitioners but had directed that they be released on bail in the event of their arrest. There was no serious dispute between the parties before me that the petitioners are political rival of the present Government in the State. It is also a matter of fact that petitioner No.1, as a Chief Minister, had persued the cases against the present Chief Minister and his son, for which they are facing prosecution in the court of law. Soon after taking over, the constitution of the Vigilance Bureau was changed. The details reference in regard to the political vendetta being persuaded by the parties has been made in the reply filed on behalf of the petitioners. It would be safe to say that respective parties have been acting against each other at different points of time, which may lead to reading something in the present case being registered against the petitioners.

Taking into consideration the totality of the facts and the law as discussed in detail, I am of the view that the petitioners have

made out a case for grant of pre-arrest bail under Section 438 Cr.P.C. Since the prosecution agency has not been able to justify need for their prayer for custodial interrogation of the petitioners, the submission that such a bail should be for a limited duration of few days, when the petitioners should approach a regular Court, would be doing injustice to the legal provisions of Section 438 Cr.P.C. Such a bail, even if for limited duration, has to be till such time when some change in fact situation can be expected. In exercise of discretion available with the Court and taking into account the facts and circumstances of this case, the interim order dated April 05, 2007, is made absolute. Nothing is alleged against petitioner No.2. No prayer is made for having her for investigation. She need not, as such, is required to approach regular Court. If petitioner No.2 is needed in future in this case, she would be given a ten days notice in advance. If need so arises, petitioner No.1 would apply for regular bail on presentation of a challan and this order shall enure till then. Petitioner No.1 shall abide by conditions contained in Section 438 (2) Cr.P.C.

The petition is accordingly allowed in the above terms.

July 30, 2007 **(RANJIT SINGH)**
khurmi **JUDGE**